

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PETROLEUM TANK RELEASE COMPENSATION BOARD

In the Matter of the Application of
Gas & Go, Inc., Leak Site No. 9205

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for a prehearing conference before Administrative Law Judge (ALJ) Allen E. Giles, at 1:30 p.m. on September 9, 1998, at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota 55401.

Patrick M. Driscoll, Assistant Attorney General, NCL Tower, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Commerce.

There was no appearance by or on behalf of Tom Vogt, Gas & Go, Inc., 2640 Rice Street, Little Canada, Minnesota 55113 ("Applicant").

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STATEMENT OF ISSUE

The issue in this contested case proceeding is whether the Applicant is entitled to additional amounts of reimbursement under Minn. Stat. ch. 115C (1998) and Minn. R. ch. 2890 (1997).

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Notice of and Order for hearing in this matter was sent by certified mail to Applicant, Tom Vogt, Gas & Go, Inc., 2640 Rice Street, Little Canada, Minnesota 55113, on July 28, 1998.

2. The Applicant signed a "Return Receipt" card on July 29, 1998, indicating that he had received the Notice of and Order for Hearing.

3. The Notice of and Order for Hearing mailed to the Applicant included the following notice in bold-face type on page 6:

If a party fails to appear at any prehearing conference or settlement conference or the hearing in this matter or fails to comply with an interlocutory order of the judge after having been served with a copy of this Order, that party shall be deemed in default under Minn. R. 1400.6000 (1997) and the allegations or issues set forth herein may be deemed

proved and the matter determined against the party without further proceedings.

4. Enclosed with the Notice of and Order for Hearing mailed to the Applicant was a Notice of Appearance form. The Applicant was instructed to file the enclosed Notice of Appearance with the Administrative Law Judge within twenty days of the date of service of the Notice of and Order for Hearing.

5. The Applicant did not file a Notice of Appearance with the Administrative Law Judge or make any prehearing request for a continuance or any other relief.

6. The Applicant did not appear at the prehearing conference scheduled for September 9, 1998, or have an appearance made on his behalf.

7. Because the Applicant failed to appear at the prehearing conference in this matter, he is in default. Pursuant to Minn. Rules 1400.6000 (1997), the allegations contained in the Notice of and Order for Hearing are hereby deemed proved and are incorporated into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Petroleum Tank Release Compensation Board, the Commissioner of Commerce and the Administrative Law Judge have jurisdiction in this matter pursuant to Minnesota Statutes ch. 115C (1998), Minnesota Rules 2890.0110 (1997), and Minnesota Statutes § 14.50.

2. On January 15, 1997, the Applicant applied to the Board for reimbursement of \$14,594.59 based on \$16,216.21 of claimed eligible costs for cleanup of a petroleum leak.

3. On September 4, 1997, Board staff approved reimbursement of \$9,927.57, based on eligible costs of \$11,293.04.

4. The Applicant failed to file a written notice of appeal of the Board staff's initial determination within 60 days of the notice of that determination as required by Minn. Stat. § 115C.12, subd. 1 (1998).

5. On December 10, 1997, the Board determined not to consider Applicant's subsequent untimely appeal. On January 5, 1998, the Applicant appealed the Board's decision not to hear the late appeal.

6. The Board has given proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law and rule.

7. The Applicant, having made no appearance at the prehearing conference and not requesting any continuance or other relief, is in default. Pursuant to Minnesota Rules 1400.6000 (1997), the allegations contained in the Notice and Order for Hearing are hereby taken as true.

8. The additional costs claimed by Applicant are ineligible for reimbursement. Specifically, the \$2,210.03 claimed by Applicant for costs of laboratory tests and

analysis, \$1,036.10 for excavation costs, and \$403.50 for consultant costs for a total of \$3,649.63 are ineligible because these costs were included in change orders which fail to satisfy the deviation criteria provided in Minn. Rule 2890.0078, subp. 2 (1997). The \$1,144.76 for markup charges claimed by Applicant are also ineligible because they were not included in the contractor proposal pursuant to Minn. Rule 2890.0074 (1997).

9. The Board may also reduce the amount of Applicant's reimbursement by 10% or \$236.17 for Applicant's failure to provide evidence of two consultant/contractor proposals as required by Minn. Stat. § 115C.09, subd. 3(i) (1998).

10. As a result of Conclusions 8 and 9 above, the Applicant is not entitled to additional amounts of reimbursement under Minn. Stat. ch. 115C (1998) or Minn. R. ch. 2890 (1997).

11. The final decision in a contested case on an appeal of a Board determination shall be made by the Commissioner of Commerce. Minn. Stat. § 115C.12, subd. 3.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Commerce DENY the Applicant's request for additional amounts of reimbursement.

Dated this 25th day of September, 1998.

ALLEN E. GILES
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded (1 tape).

Default